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No. 97-1056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NAOMI MARQUEZ,

Petitioner,

v.

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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ARGUMENT

I. The National Labor Relations Act Does Not Authorize Unions to Negotiate Compulsory Unionism Provisions That Cannot Lawfully Be Enforced Literally.

A. The Statute's Text Does Not Support the Schizophrenic Construction That SAG Proposes.

Respondent Screen Actors Guild ("SAG") does not deny that the "union security" clause of its collective bargaining agreement with Respondent Lakeside Productions, Inc. ("Lakeside") literally requires full union membership and payment of full union dues and initiation fees. SAG also does not deny that those requirements cannot lawfully be enforced. (*See* SAG's Br. at 12-13.) Yet, SAG argues that its negotiation and maintenance of that clause do not breach its duty of fair representation, because "what SAG has done here is to negotiate a union security agreement that denotes the pertinent obligations in the terms expressly authorized by Congress." (*Id.* at 9-10.)

In fact, Congress ***never*** "expressly authorized" compulsory unionism agreements in any particular ***form*** or ***language***. Instead, in section 8(a)(3) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 158(a)(3) (1994), Congress authorized agreements with certain substantive requirements and effects as to "membership" as that word is qualified by the section's second proviso.

Neither section 8(a)(3) nor any other provision of the NLRA defines "membership." However, this Court has authoritatively interpreted section 8(a)(3) not to require "membership" in the colloquial sense of personal involvement of an employee within a union. Under "the second proviso to § 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). Even this "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Communications Workers v. Beck*, 487 U.S. 735, 762-63 (1988) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984)).

"A rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding

than a rule that is based on the plain meaning of a statute." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 112 (1989). After "a statute has been construed . . . by this Court . . . it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part, dissenting in part).

Thus, if Congress can be said to have authorized any "standard-form 'membership' union security agreement," (SAG's Br. at 17), it must be one that requires no more than that nonunion employees pay "those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues,'" *Beck*, 487 U.S. at 762-63 (quoting *Ellis*, 466 U.S. at 448). Logically, the proper form and language of such an agreement should conform with this judicially construed substantive limitation and contain this or equivalent language, not the bare, misleading language of the statute.

SAG attempts to support its schizophrenic construction of section 8(a)(3) by arguing that the first proviso to the section "is addressed to the negotiation of union security agreements," and the second "is addressed [only] to the enforcement of such agreements once negotiated." (SAG's Br. at 9-10; *see id.* at 18-19.) No such artificial dichotomy exists between the two provisos.

As SAG's Brief at 12 concedes, these are "two intertwined provisos." Consequently, ***both*** provisos must be consulted to determine what compulsory unionism agreements may lawfully be negotiated. A "statute is to be read as a whole." The "meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The Court looks "not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

That is what this Court did in *Beck*. The question there was not merely what limits the second proviso places on the enforcement of compulsory unionism agreements. It was what "limits § 8(a)(3) places on the ***negotiation*** and enforcement of union security agreements." 487 U.S. at 745 (emphasis added). The Court noted that this section

"contains ***two*** provisos without which all union-security ***clauses*** would fall within [§ 8(a)(3)'s] otherwise broad condemnation" of employer discrimination encouraging union membership. The second proviso "***limit[s] the first***." *Id.* at 744 (emphasis added). "***Taken as a whole***, §8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but ***the 'membership' that may be so required has been 'whittled down to its financial core***.'" *Id.* at 745 (quoting *General Motors*, 373 U.S. at 742) (emphasis added) (footnote omitted). The Court then defined that "financial core" as including "only those fees necessary to finance collective-bargaining activities," because of the Act's policy of "provid[ing] only the most grudging authorization of [union-security] agreements." *Id.* at 755, 759.

B. This Court Has Already Rejected SAG's Misreading of the Legislative History of NLRA Section 8(a)(3).

Section 8(a)(3) was added to the NLRA by the Taft-Hartley Act of 1947, Pub. L. 80-101, 61 Stat. 136, 140. SAG argues that the legislative history of the section shows that Congress gave "express, unequivocal permission . . . for employers and unions to 'enter into agreements requiring all the employees in a given bargaining unit to become members.'" (SAG's Br. at 18-23 (quoting S. Rep. No. 80-105, at 7 (1947) ("S. Rep."), *reprinted in* Subcomm. on Labor, Sen. Comm. on Labor and Public Welfare, *Legislative History of the Labor Management Relations Act, 1947*, at 413 (1974) ("Legis. Hist.")).) However, that legislative history "is a virtual potpourri of conflicting statements and inferences," selected quotation of which can support conflicting interpretations of § 8(a)(3). Thomas R. Haggard, *Compulsory Unionism, the NLRB, and the Courts* 60 (U. Pa. Wharton Sch. Indus. Res. Unit, Lab. Rel. & Pub. Pol'y Series Rep. No. 15, 1977).

For example, SAG quotes the Senate Report's statement "that § 8(a)(3) 'abolishes the closed shop but permits voluntary agreements for requiring such forms of compulsory membership as the union shop.'" (SAG's Br. at 19 (quoting S. Rep. at 3, Legis. Hist. 409).) This proves nothing, because, as Senator Taft, an author of the 1947 legislation, pointed out: "The union shop is not defined. No one knows what it is. We did not use the term in the bill." 93 Cong. Rec. 5081 (1947), Legis. Hist. 1408. Moreover, Congress' intent was not "completely to abolish the union shop," but to permit it only in a

limited form. *Id.* at 5087-88, Legis. Hist. 1420 (remarks of Sen. Taft). Section 8(a)(3)'s ***second*** proviso is a condition that Congress "imposed even on the union shop." *Id.* at 3952-53, Legis. Hist. 1010 (remarks of Sen. Taft).[1]

What SAG ignores is that this Court has already reviewed section 8(a)(3)'s legislative history at least three times. Each time the Court concluded that Congress did not intend to allow agreements that require membership as a condition of employment.

First, in *General Motors*, this Court concluded from the legislative history that "the 1947 amendments not only abolished the closed shop but also made significant alterations in the meaning of 'membership' ***for the purposes of union-security contracts***. . . . 'Membership' as a condition of employment is whittled down to its financial core." 373 U.S. at 742 (emphasis added). As the Ninth Circuit said in *NLRB v. Hershey Foods Corp.*, the "legislative history of the 1947 amendments . . . shows that the union shops permitted by the compromise were burdened by many restrictions and can be described better as '***in the nature of*** union shops.'" 513 F.2d 1083, 1085 (9th Cir. 1975) (quoting H.R. Rep. No. 80-245, at 30 (1947), Legis. Hist. 321) (emphasis added).

After reviewing the legislative history again in *Pattern Makers v. NLRB*, this Court held that "Congress in 1947 sought to eliminate ***completely*** any requirement that the employee maintain full union membership." 473 U.S. 95, 107 (1985) (emphasis added). All requirements to maintain full membership are not eliminated completely if a contract says that "membership" is required.

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[1] For another example, SAG's Brief at 20-21 quotes part of the Senate Report that describes the precursor to § 8(a)(3)'s second proviso as designed "to safeguard the rights of employees after [a union-shop] contract has been entered into," S. Rep. at 7, Legis. Hist. 413. From this single sentence—indeed, from the single word "after"—SAG extrapolates that Congress did not intend § 8(a)(3)'s second proviso to apply to the terms of the contract. That is an incredible—and false—leap of logic (and inconsistent with the legislative history as interpreted by this Court, as we show next). A limit on what a "union security" agreement can say does protect employees ***after*** it is negotiated, because such a limit prevents them from being misled by the agreement.

Lastly, in *Beck*, this Court rejected an argument "that the inroads Congress made in 1947 on the policy of compulsory unionism were . . . limited, and were designed to remedy only those 'carefully defined' abuses of the union shop system that Congress had expressly identified." 487 U.S. at 754. Rather, the legislative history shows that the amendments "provide only the most grudging authorization of [union-security] agreements," giving unions ***only*** "'the power to ***contract*** to meet'" the problem of "'employees who are getting the benefits of union representation without paying for them.'" *Id.* at 755-56 (quoting *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976), and *Radio Officers v. NLRB*, 347 U.S. 17, 41(1954)) (emphasis added). Thus, all that a union can contract for under *Beck* is payment of "'collective-bargaining-related dues,'" 487 U.S. at 760.

C. This Court Has Not Affirmed the Validity of "Union Security" Clauses That Purport to Require Membership.

Relying heavily on cases preceding *Beck*, SAG argues that this Court "has gone out of its way to affirm the validity" of "standard-form 'membership' union security clauses." (*E.g.*, SAG's Br. at 11, 24-27.) However, the facial validity of a contract requiring "membership" was not at issue in any of the pre-*Beck* cases. *Beck* itself pointed out that "***we have never before*** delineated the precise limits § 8(a)(3) places on the negotiation . . . of union-security agreements." 487 U.S. at 745 (emphasis added). Therefore, the comments SAG quotes—often out of context—from the earlier cases are at best dicta.

SAG also asserts that *Beck* addresses "only 'whether [§ 8(a)(3)] . . . permits a union, over the objections of dues-paying nonmember employees, to expend [agency fees] on activities unrelated to collective bargaining, contract administration, or grievance adjustment.'" (SAG's Br. at 25-26 (quoting *Beck*, 487 U.S. at 738) (SAG's emphasis omitted).) However, this assertion depends upon selective quotation out of context from *Beck*.

Two of the *Beck* quotations SAG uses, from 487 U.S. at 738 and 749, merely paraphrase section 8(a)(3)'s terms. They are not holdings concerning the validity of a contract that uses those terms literally. Moreover, the first quotation does not say that the section authorizes agreements requiring "membership." It refers only to "an agreement

requiring all employees in the bargaining unit to pay periodic union dues and initiation fees." *Id.* at 738.

A third quotation SAG takes from *Beck* is incomplete. The full sentence implies a limit on both the negotiation and enforcement of "union security" agreements: "***Taken as a whole***, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, ***but the 'membership' that may be so required has been 'whittled down to its financial core***.'" *Beck*, 487 U.S. at 745 (quoting *General Motors*, 373 U.S. at 742) (footnote omitted) (emphasis added to the language SAG omitted).[2]

Moreover, SAG ignores *Beck*'s repeated characterization of the question presented there as a "question concerning the ***validity of . . . agreements***" "requiring payment of full union dues." *Id.* at 741-42. The nonmembers' claim in *Beck* was "that the union failed to represent their interests fairly and without hostility by ***negotiating*** and enforcing an agreement that allows the exaction of funds for purposes that do not serve their interests and in some cases are contrary to their personal beliefs." *Id.* at 743 (emphasis added). *Beck* "delineated the precise limits § 8(a)(3) places on the ***negotiation*** and enforcement of union-security agreements." *Id.* at 745 (emphasis added).

In sum, *Buzenius v. NLRB*, 124 F.3d 788, 792-93 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3427 (U.S. Dec. 8, 1997) (No. 97-945), and *Bloom v. NLRB*, 30 F.3d 1001, 1003-05 (8th Cir. 1994), correctly concluded that, because of this Court's decisions construing

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[2] *Machinists v. Street*, 367 U.S. 740 (1961), was "controlling" in *Beck* as to "whether th[e] 'financial core' includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." 487 U.S. at 745. However, that does not mean that *Street*'s dicta that "the union-shop agreement itself is not unlawful," 367 U.S. at 771, controls on the question presented here, as SAG's Br. at 26 suggests. There was no allegation in *Street* that the contract there was facially invalid.

section 8(a)(3), agreements that do not state employees' options under those decisions are facially invalid.[3]

II. SAG's Negotiation and Maintenance of a Compulsory Unionism Provision That Overstates Employees' Obligations Breaches the Duty of Fair Representation.

SAG contends that its "union security" agreement does not violate the duty of fair representation, because the phrase "member of the Union in good standing" is a "term of art" that can only be enforced consistent with this Court's construction of section 8(a)(3). SAG says that in *NLRB v. News Syndicate Co.* this Court "squarely held that a union security agreement that is capable of . . . a lawful construction is to be so read and 'cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.'" (SAG's Br. at 23-24 (quoting 365 U.S. 695, 700 (1961).)

Again, SAG quotes the Court out of context. What *News Syndicate* says is that, "***'[i]n the absence of provisions calling***

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[3] SAG argues that *Buzenius* and *Bloom* are distinguishable, because in those cases the compulsory unionism provisions were unlawfully applied. (SAG's Br. at 29 n.8, 37 n.9.) That would be immaterial even if true, because both decisions held the clauses at issue ***facially*** invalid and ordered them expunged or modified. *See Buzenius*, 124 F.3d at 793; *Bloom*, 30 F.3d at 1004-05. Those remedies would have been unnecessary to correct mere unlawful enforcement of facially valid provisions. Moreover, it is undisputed that SAG unlawfully applied this agreement to require payment of full dues, without notice to Petitioner Naomi Marquez ("Marquez") of her *Beck* rights. (Pet. App. at 17a-18a; J.A. at 46.)

Buzenius did not "turn[] on a distinction between 'membership in good standing' union security agreements and 'membership' union security agreements," (SAG's Br. at 37 n.9). *Buzenius* concluded that a "union-security clause" which "say[s] what it cannot literally mean" "misleads employees into believing that they may not exercise free choice in the matter of union membership" and "turns normal contract interpretation on its head." 124 F.3d at 792-93. That is true whether the clause speaks of "membership" or "membership in good standing," "in light of the Court's decisions whittling § 8(a)(3) ***'membership'*** down to its financial core," *id.* at 792 (emphasis added). The phrase "in good standing" simply makes the agreements in *Buzenius* and here even more misleading than agreements that speak only of "membership."

explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.'" 365 U.S. at 699-70 (quoting *NLRB v. News Syndicate Co.*, 279 F.2d 323, 330 (2d Cir. 1960), *aff'd*, 365 U.S. 695 (1961)) (emphasis added). The contract in *News Syndicate* did not explicitly call for illegal conduct, because it did "not require journeymen and apprentices to be union members." *Id.* at 699.

Here, in contrast, the contract does call explicitly for illegal conduct, because it requires all employees to "be a member of the Union in good standing" and pay the "dues and the initiation fee uniformly required as a condition of . . . membership." (J.A. at 28-29.) As SAG concedes, it is only when employees consult "external sources"—"'the body of law which [has] grow[n] up in [the § 8(a)(3) area'"—that they might discover that this contract may require less than it says. (SAG's Br. at 23, 30 (quoting *Teamsters Local 147 v. Lucas Flour Co.*, 369 U.S. 95, 104 n.11 (1962).)

SAG asserts that the "entire panoply of NLRA § 8(a)(3) union security agreement rules" is "incorporated by reference through a standard-form 'membership' union security clause." (SAG's Br. at 4, 14.) However, SAG's "union security" clause contains no reference to external sources explicating those rules. It does not even suggest that external sources need or could be consulted to understand what the clause actually means, that "membership" is not used in the colloquial sense, or that "periodic dues and the initiation fee" mean something quite different from regular union dues and fees. In addition, the clause exacerbates matters by telling the employee that he or she must become a "member of the Union ***in good standing***." (J.A. at 28-29 (emphasis added).)

Quoting its Director of Legal Affairs, SAG claims that "'it is well-known in the industry that a performer does not have to be a member of SAG to work on a project governed by a SAG contract.'" (SAG's Br. at 16 (quoting J.A. at 49).) This self-serving "testimony" is contradicted by the National Labor Relations Board ("NLRB" or "Board") and respected labor-law scholars. (*See* Pet'r's Br. at 14 n.7.)

The "legally prescribed meaning" of "member" might arguably be in "common usage" among experienced labor lawyers and union and employer representatives who negotiate compulsory unionism

clauses. (SAG's Br. at 24.) However, that meaning is unlikely to be in "common usage" among performers, who are not parties to the contract, or casting and talent agents, who enforce the contract at the point of hire. The latter are all laymen who can be expected to understand "member" only in the colloquial sense. Moreover, the issue here is not how the contract might be read by the parties to it. The question is whether one of those parties—the union—has a duty to write a clause that truthfully states, in lay terms, what obligations the clause imposes on third parties—employees—for whom it is a fiduciary and who cannot be charged with knowledge of the intent or understanding of the contracting parties, because they did not participate in the contractual negotiations.

SAG concedes that employees cannot be presumed to know about, let alone fully to understand, the case law applying the "terms of art" used in "union security" agreements, when it states that "[u]nions—in taking any initiative to sign up members, in responding to any employee initiative or inquiry, and in taking any action to enforce a union security clause—must accurately explain to the employee the meaning of the 'membership' requirement." (SAG's Br. at 35.) SAG's defense, thus, is that, although it has a duty "accurately [to] explain to the employee the meaning of the 'membership' requirement," this duty does not arise in negotiating the "union security" clause. That is, SAG asserts that its duty of fair representation does not require it to write a clause that says, in lay terms, what employees' obligations really are.

The short answer to this is that *Beck* explicitly held that a union's duty of fair representation with respect to a "union security" arrangement embraces ***both*** negotiation and enforcement. 487 U.S. at 743. In practice, that duty can be meaningful to employees only if it requires the union "accurately [to] explain to the employee the meaning of the 'membership' requirement" ***in the "union security" agreement itself***, the fundamental "law of the shop."

SAG complains that its negotiation of the clause involved here could not have been arbitrary or in bad faith, because it "follows the 'model union-security clause' prescribed by the NLRB" in *Keystone Coat, Apron & Towel Supply Co.*, 121 N.L.R.B. 880, 885 (1958). According to SAG, *Electronic Workers Local 444*, 311 N.L.R.B. 1031 (1993), *rev'd in part on cross-petitions for review & enforcement*, 41

F.3d 1532 (D.C. Cir. 1994), did not overrule *Keystone Coat* in this regard. SAG relies on the fact that *Electronic Workers Local 444* held that a "'members of the Union in good standing'" clause was not "facially unlawful," because it was "capable of a lawful construction," 311 N.L.R.B. at 1037. (SAG's Br. at 28-29 & n.8.)

However, in *Electronic Workers Local 444* the NLRB also found that the clause was "ambiguous," and that "it is likely that employees unversed in the intricacies of Section 8(a)(3) and interpretative decisions will literally interpret the clause as requiring full membership and all attendant financial obligations." 311 N.L.R.B. at 1037. The Board, therefore, held that the unions there "breached their fiduciary duty to . . . employees by failing to inform them that their sole obligation under the union-security provision was to pay dues and fees." *Id.* at 1040.

Significantly, in a part of its decision entitled "*Keystone* Overruled as to the Model Clause," the Board said: "Because we have found that the phrase 'membership in good standing' is ambiguous, we specifically reject the model clause in *Keystone* which contains this provision." *Id.* at 1041. The Board decided *Electronic Workers* more than a year before SAG entered into its collective bargaining agreement with Lakeside. (*See* Pet'r's Br. at 21 n.10.)

Moreover, the NLRB decided *Keystone Coat* before this Court delineated the limits of section 8(a)(3) in *General Motors* and *Beck*. SAG concedes that, consequently, its clause "reveals the covered employees' rights and duties" only "in terms of art that can only be fully understood by the employees through reference to external sources." (SAG's Br. at 30.) Negotiation of such a clause is *per se* bad faith conduct, despite *Keystone Coat*, because, after *General Motors* and *Beck*, "the only realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union." *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986, 990 (7th Cir. 1997).[4]

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[4] *See also* William B. Gould IV, The Board, The Supreme Court and the National Labor Relations Act: Reflections of the Chairman of the National Labor Relations Board on Issues Decided and Issues Presented, Address at the Connecticut

(continued...)

SAG argues that using the statutory language avoids "contentious" negotiations between employers and unions over "the proper wording of a union security agreement." (SAG's Br. at 32.) If use of the statutory language avoids "contentious" negotiations, even more so will use of the statutory language as definitively construed by this Court. And if "what constitutes an adequate summary of the rights and obligations of employees covered by union security clauses is a highly contested matter" now, (SAG's Br. at 33), it will no longer be so when this Court has spoken clearly on the issue.

In *Keystone Coat*, the Board thought that it "should not be difficult for the parties who draft union-security clauses to adhere to the statutory requirements clearly set forth by Congress" in section 8(a)(3). It also suggested a "model union-security clause" "to assist any parties who might encounter difficulty in drafting." 121 N.L.R.B. at 885. The Board failed to anticipate that *General Motors* and *Beck* would find limits on compulsory unionism clauses that are only implicit in section 8(a)(3), thus rendering drafting a little more difficult and the *Keystone Coat* clause misleading. However, once this Court clearly defines here an adequate statement of the rights and obligations of employees, parties negotiating compulsory unionism clauses should have no difficulty in adhering to the statutory requirements of section 8(a)(3) as definitively construed by this Court.[5]

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[4] (...continued)

Bar Association's Labor and Employment Law Section Seminar on "Ethical Landmines in Labor Relations" at 7 (May 21, 1998), *in* NLRB Release R-2293 ("a majority of the Board subscribes to the view that the duty of fair representation standard has been violated where the collective agreement's language is contrary to the Court's ruling in *General Motors* and *Beck*").

[5] A clause explaining employees' rights and obligations in terms easily understood by laymen is not difficult to draft:

"A. No employee shall be required to become a member of the union as a condition of employment. Each employee shall have the right to join, not join or maintain or drop his membership in the union. No employee shall be discriminated against on account of his membership or non-membership in the Union." *Monsanto Chem. Co.*, 147 N.L.R.B. 49, 50 n.2 (1964).

(continued...)

SAG pretends that the Act "prevents" the misuse of "standard-form 'membership' union-security clauses" to "suggest to employees that they must be full union members," because unions failing to inform employees accurately of their rights "commit an unfair labor practice." (SAG's Br. at 35.) If the Act truly prevented such misuse, cases in which unions have misused "membership" clauses would not have been necessary. *See, e.g.*, *Buzenius v. NLRB*, 124 F.3d 788, 789 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3427 (U.S. Dec. 8, 1997) (No. 97-945); *Bloom v. NLRB*, 30 F.3d 1001, 1002 (8th Cir. 1994); *Rochester Mfg. Co.*, 323 N.L.R.B. No. 36 (Mar. 12, 1997), *petition for review filed sub nom. Cecil v. NLRB*, No. 97-5302 (6th Cir. Mar. 14, 1997). "Membership" clauses clearly facilitate union officials' ability to misrepresent employees' rights.[6] Moreover, how many cases never reach the NLRB or court, because employees never learn that they have been misled by "membership" clauses that overstate their true obligations?

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[5] (...continued)

B. Employees who do not become members of the union after thirty days of employment, and who do not have bona fide religious objections to joining or financially supporting labor organizations, shall as a condition of continuing employment pay to the union an amount equal to "the periodic dues and the initiation fees uniformly required of members," or, if they notify the union that they object to paying for other costs, an amount equal to that portion of the dues and fees "necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" 29 U.S.C. §§ 158(a)(3), 169 (1994); *Beck*, 487 U.S. at 762-63 (quoting *Ellis*, 466 U.S. at 448).

[6] SAG misrepresents the record when it asserts that it has not "applied the 'membership' provision to require that performers become 'full' members" and implies that it notifies all performers of their *Beck* rights. (*See* SAG's Br. at 1-2, 16-17.) The Ninth Circuit held that whether SAG affirmatively attempted to require Ms. Marquez to become a full member was a genuinely disputed issue of fact. (Pet. App. at 14a, 16a.) It is undisputed that SAG only gives *Beck* notices to employees who object to membership, and never gave Ms. Marquez such notice. (*Id.* at 17a-18a; J.A. at 46, 51-52.) The Ninth Circuit instructed the district court to decide on remand whether this lack of notice "constituted an arbitrary breach of the duty of fair representation." (Pet. App. at 18a.)

SAG argues that Ms. Marquez's "claim based on the wording of the SAG 'membership' union security clause," like the claim in *Wegscheid*, "is most certainly moot," because she "never saw the clause and was never apprised of its wording," and cannot "claim that the wording of the clause confused her or misled her in any way or that a 'change in the collective bargaining agreement' would be of any significance to her." (SAG's Br. at 40 (quoting *Wegscheid*, 117 F.3d at 990).) This argument is disingenuous, because Lakeside's casting director knew and relied on the clause's text in enforcing it against Marquez. (J.A. at 25-28.) Indeed, when Marquez's talent agent suggested that external law overrode the clause's wording, the casting director replied that she was "obligated to work with that contract," which "by its terms had limitations and restrictions on Lakeside's employing people that were not SAG members." (*Id.* at 34-35.)

Thus, Ms. Marquez was misled indirectly by—and discharged because of—the wording of SAG's "union security" clause even though she did not see it. Unlike the *Wegscheid* plaintiffs, Marquez was injured by the clause, because she lost her job due to SAG's and Lakeside's insistence, at least, on the literal terms of the clause that she pay full dues, if not that she join SAG. (*See* Pet. App. at 2a-4a, 14a, 24a-26a.) It is undisputed that those parties never told Marquez that she could pay less than full dues. (*Id.* at 17a-18a; J.A. at 46.)

Moreover, Ms. Marquez continues to seek employment in the motion picture industry. (Dist. Ct. R. ("R.") 39, Marquez Dep. at 11.) Therefore, modification of the agreement would be significant for her, because the misleading membership and full dues language is part of a "standard-form union security clause" that SAG uses with many employers in that transient industry. (SAG's Br. at 1; *see* J.A. at 28-29, 38-42, 53-54.)

SAG also implies that its "membership" clause did not damage Ms. Marquez, because her talent agents "understood each and every one of the public law limitations on . . . a 'membership' union security clause." (SAG's Br. at 34-35.)[7] As the court of appeals said in

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[7] Another possible inference from the testimony SAG's Brief at 2-3 cites is that Ms. Marquez's agents understood that paying dues ***made*** one a member. (*See* (continued...)

rejecting the identical argument regarding Marquez's claim that SAG misrepresented her obligations in statements outside the bargaining agreement, "[e]ven were this so, . . . [i]f SAG ***asserted*** that Marquez was required to join the union as a condition of employment this would, of course, implicate its duty of fair representation." (Pet. App. at 14a (emphasis added).) What is relevant is not what Marquez or her agents understood the law to be, but what SAG, through Lakeside, was demanding under the contract, which indisputably was at least payment of full dues. *See also NLRB v. Teamsters Local 291*, 633 F.2d 1295, 1298 (9th Cir. 1980) (a "union's fiduciary duty to represent and deal fairly with" employees required it to inform an employee of his obligations under a "union security" agreement though he independently "had full knowledge of his responsibility to pay").

In sum, none of SAG's excuses justifies its negotiation and maintenance of a compulsory unionism provision that misleadingly states obligations that cannot lawfully be enforced against employees, *i.e.*, full membership and payment of full dues and initiation fees.

III. SAG Does Not Explain Why the Duty of Fair Representation Is Breached, and the Federal Courts Have Jurisdiction, If a Union Misrepresents the *Extent* of an Employee's Obligations Under Section 8(a)(3), But Not If It Misrepresents *When* Those Obligations Apply.

The second question this case presents is whether the NLRB has exclusive jurisdiction over a claim that SAG breached the duty of fair representation by negotiating a compulsory unionism clause that misinforms performers who have been employed in the motion picture industry for more than thirty days that they must be union members before they begin any new employment. (Pet'r's Br. at i, ¶ II.) SAG argues that this claim is within the NLRB's exclusive jurisdiction because it "'rests squarely upon the proper interpretation of § 8(a)(3).'" (SAG's Br. at 45 (quoting Pet. App. at 13a).)

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[7] (...continued)

J.A. at 33 (a "financial core ***member*** is required to pay only for the collective bargaining agreement"), 37 ("My understanding was that 'must join' meant paying the required financial obligation. ***Beyond that I'm not aware of specifically what happens with paperwork or contracts***").)

However, SAG does not argue that the NLRB has exclusive jurisdiction over a claim that a union breached the duty of fair representation by negotiating a compulsory unionism clause that misinforms employees that they must be members and pay full dues. *Beck* forecloses such an argument. *Beck* held that the latter claim is not within the NLRB's exclusive jurisdiction, even though that claim also rests squarely on the proper interpretation of section 8(a)(3), *i.e.*, whether the clause states employees' obligations in terms section 8(a)(3) prohibits. *See* 487 U.S. at 742-44.

Indeed, SAG ***concedes*** that an "allegation that a union has misled employees about their obligations under a union security agreement is, substantively, a 'claim that the union failed to represent [the employees'] interests fairly and without hostility,' and is, in that sense, the kind of fair representation claim presented in *Beck*." SAG also ***concedes***: "that the Union here, like the union in *Beck*, 'seek[s] to defend [it]sel[f] on the ground that the statute authorizes precisely this type of agreement' does not divest the federal courts of jurisdiction." (SAG's Br. at 43 (quoting *Beck*, 487 U.S. at 743).) These concessions are fatal to SAG's argument on this jurisdictional issue.

In *Wegscheid*, the Seventh Circuit explicitly ruled, based on *Beck*, that "an alleged violation of section 8(a)(3) is litigable in a district court suit challenging statements" that "happen to be contained in the collective bargaining agreement, since the union's duty of fair representation can be violated by union conduct in the negotiation of a collective bargaining agreement, as well as in the enforcement of it." 117 F.3d at 989 (citations omitted). SAG does not explain how the question of the facial validity of a compulsory unionism clause that misleadingly speaks of a membership or full dues requirement that violates section 8(a)(3) is different from the question of the facial validity of a clause that misleadingly speaks of a thirty-day "employment in the industry" requirement that also violates that section. No logical distinction exists. In both cases, deciding the appropriate scope of section 8(a)(3) is necessary, as it was in *Beck*.

Ignoring *Wegscheid*, SAG cites *Beverly Enterprises-Pennsylvania v. District 1199C*, 90 F.3d 93 (3d Cir. 1996). (SAG's Br. at 44.) *Beverly Enterprises* is inapposite, because there an employer, to whom the union owed no duty of fair representation, attempted to attack the

validity of its own compulsory unionism provision solely and directly on the ground that the provision violated section 8(a)(3).

SAG also relies on *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). (SAG's Br. at 44-45.) However, *Lockridge* ***supports***, not undermines, court jurisdiction over Ms. Marquez's claim concerning SAG's "employment in the industry" clause. *Lockridge* recognized that "an action seeking damages for injury inflicted by a breach of a union's duty of fair representation [i]s judicially cognizable . . . even if the conduct complained of [i]s arguably protected or prohibited by the National Labor Relations Act." Moreover, *Lockridge* acknowledged that perhaps "Lockridge's second amended complaint could be construed to assert . . . th[is] theor[y] of recovery." 403 U.S. at 299. Lockridge's claim was preempted only because "'arbitrary or bad-faith conduct on the part of the Union'" was "not even asserted to be relevant in the proceedings below." *Id.* at 299-300 (quoting *Vaca v. Sipes*, 386 U.S. 171, 193 (1967)). Here, in contrast, Marquez *did* assert below that SAG's negotiation of the "employment in the industry" clause was arbitrary and in bad faith. (*E.g.*, Appellant's Br. at 3, 44-47 (9th Cir. filed Sept. 3, 1996); J.A. at 9-10, ¶¶ 10-11; *id.* at 24, ¶ 11.)

SAG attempts to escape the force of its concessions by contending that Ms. Marquez cannot "recast her claim to be that 'SAG's negotiation of [a] misleading 'employment in the industry' requirement breached the duty of fair representation,'" because "the word 'misleading' does not appear once in the section of Ms. Marquez's Ninth Circuit brief addressed to the grace period issue." (SAG's Br. at 49 (quoting Pet'r's Br. at 22).) Even were that true, this Court can consider an issue not raised below in a federal-court case where "the issue is squarely presented and fully briefed" and "is an important, recurring issue." *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *see Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984).

Here, the claim that negotiation and maintenance of the "employment in the industry" clause breached the duty of fair representation, because it is "misleading," was squarely presented by the second Question Presented in the Petition for a Writ of Certiorari at i; SAG's Response to the Petition did not argue that Ms. failed to raise this claim below. In addition, both parties have fully briefed the claim. (Pet'r's Br. at 22-28; SAG's Br. at 40-50.)

More important, Ms. Marquez has not "recast" this claim. SAG ***falsely*** suggests that she did not argue below that the "employment in the industry" clause on its face breached the duty of fair representation because it was misleading. Marquez explicitly raised this claim below.

Ms. Marquez's Complaint alleged that "maintenance" of the "employment in the industry" clause "violated the duty of fair representation which requires that . . . it ***accurately*** advise employees of their rights and obligations." (J.A. at 9-10, ¶¶ 10-11 (emphasis added).) Her Motion for Summary Judgment asserted that the clause breaches the duty because "on its face [it] unlawfully ***purports*** to require" payment before thirty days of employment by Lakeside. (J.A. at 24, ¶ 11 (emphasis added).) Her Ninth Circuit Brief explicitly made the same argument she makes here, albeit in a section discussing the appropriate remedy for SAG's unfair representation "in negotiating an agreement including" "the 'membership in good standing,' full dues and fees, ***and 'employment in the industry'*** clauses":

> Expunction is necessary, because a facially invalid clause "has the clear capacity to ***mislead*** employees." While the "Union Security" provision here contains limits implied as a matter of law . . . , it nonetheless is ***misleading***. Those limitations are not apparent on the provision's face, and employees are unlikely to know about the judicial gloss placed on such agreements.

(Appellant's Br. at 53-54 (quoting *Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225, 227 (D. Minn. 1995)) (emphasis added) (citations omitted).)[8]

The second question presented here also includes whether, if the Board's jurisdiction is not exclusive, the breach occurred. (Pet'r's Br.

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[8] Marquez also submitted *Wegscheid* to the court of appeals as a supplemental authority, arguing that jurisdiction over her attack on the "employment in the industry" clause was supported by *Wegscheid*'s holding that a "federal district court has 'jurisdiction to entertain a challenge to a union's misrepresentations in a collective bargaining agreement' concerning an employee's obligations under a compulsory unionism provision as a breach of the duty of fair representation." (Citation of Supp. Auths. at 1 (filed June 30, 1997) (quoting 117 F.3d at 989).)

at i, ¶ II.) The facial invalidity under section 8(a)(3) of SAG's "employment in the industry" clause is clear under all relevant precedents, including one directly on point, *Theatrical Stage Employees Local 644*, 259 N.L.R.B. 1415, 1416, 1422 (1982); (*see* Pet'r's Br. at 22-24, 27). SAG, however, contends that its negotiation of the clause could not have breached the duty of fair representation, because the NLRB "indicated that employees are not entitled to a new 'thirty day grace period with every employment relationship' where a multi-employer bargaining unit is involved," in *Mayfair Coat & Suit Co.*, 140 N.L.R.B. 1333 (1963), and *Asbestos Workers Local 5*, 191 N.L.R.B. 220 (1971). (SAG's Br. at 46 (quoting Pet'r's Br. at 22).) Even were that true, it is irrelevant, because SAG's clause does not impose a single grace period upon employment with a multi-employer bargaining unit, but upon employment with ***any employer "in the motion picture industry."*** (J.A. at 29 (emphasis added).)

Moreover, SAG cites no case ***holding*** that one thirty-day grace period can lawfully apply to different employers in a multi-employer bargaining unit.[9] No question was raised as to the validity of the "grace period" provisions in either *Mayfair Coat & Suit* or *Asbestos Workers Local 5*. Furthermore, in both cases the employee was ***delinquent*** under the compulsory unionism provision in his prior employment in the multi-employer unit. *See Asbestos Workers Local 5*, 191 N.L.R.B. at 220; *Mayfair Coat & Suit*, 140 N.L.R.B. at 1334-35. When an employer rehires an employee it had previously employed, or hires an employee whom another employer in the same multi-employer unit previously employed, that employee is entitled to a new grace period unless he or she was in arrears in dues payments during the earlier employment. *E.g., Carpenters Local 740*, 238 N.L.R.B. 159, 160-61 (1978); *Teamsters Local 174*, 149 N.L.R.B. 1570, 1571-73 (1964). The latter rule would control here, because Ms. Marquez was ***not*** delinquent in her prior employment in the motion picture industry. (*See* Pet. App. at 15a; R. 39, Marquez Dep. at 9-11.)

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[9] The Administrative Law Judge's comment SAG's Brief at 46 quotes from *Theatrical Stage Employees Local 644* is, at most, uncertain dicta: "the existence of a multiemployer bargaining unit . . . ***might***, even in the absence of continuous employment, provide some ***theoretical*** basis for legality to Respondent's union-security provisions." 259 N.L.R.B. at 1422 (emphasis added).

SAG also cites no evidence that Lakeside and Marquez's prior employer in the industry were in the same multi-employer bargaining unit. Lakeside was not in ***any*** multi-employer unit. Lakeside merely separately signed the collective bargaining agreement in question two years after it was negotiated. (J.A. at 42; R. 39, Lakeside's Resp. to Pls.' 1st Interrogs. at 5-6, ¶¶ 3-4; *see* SAG's Br. at 1.) The very case SAG selectively quotes for the "basic test . . . to determine whether Lakeside ha[d] joined the multi-employer unit which originally negotiated" the agreement, (SAG's Br. at 47), establishes conclusively that Lakeside did not become a part of that unit: "'As a general rule, . . . an employer does not become part of a multi-employer bargaining group . . . where it merely adopts a collective-bargaining agreement in the negotiation of which it did not actually participate and which it did not authorize another to negotiate on its behalf.'" *NLRB v. New York Typographical Union*, 632 F.2d 171, 183 (2d Cir. 1980) (quoting *Ruan Transp. Corp.*, 234 N.L.R.B. 241, 242 (1978)).[10]

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[10] SAG's Brief at 47 also misrepresents *Carpenters Local 740*. The NLRB there found "without merit" a contention, based on *Interstate Electric Co.*, 227 N.L.R.B. 1996 (1977), that one grace period should apply to all contractors signatory to identical bargaining agreements with a union. Because there was "no multiemployer agreement" in *Carpenters Local 740*, the Board found "it unnecessary . . . to further consider the applicability, if any, the rationale expressed in *Interstate* [concerning 29 U.S.C. § 158(f)(4) (1994)] may have to cases involving Sec. 8(f)(2) of the Act," 29 U.S.C. § 158(f)(2) (1994). 238 N.L.R.B. at 161 n.5.

Interstate Electric, discussed in SAG's Br. at 47 n.11, is wholly inapposite, because it was based on "the special allowances which Section 8(f) makes for the employers and labor organizations in the building and construction industry." 227 N.L.R.B. at 1998. Congress has made no special allowances for the motion picture industry. Neither the courts nor the Board can do so. (*See* Pet'r's Br. at 27.) Moreover, *Interstate Electric* is wrong even as to a multi-employer bargaining unit in the construction industry, because it "is clear from the plain meaning of the statute that the antecedent basis of 'such employer' in section 8(f)(4) is '***an*** employer.'" *Robertson v. NLRB*, 597 F.2d 1331, 1335-36 & n.12 (10th Cir. 1979) (emphasis added). Similarly, it is clear that the antecedent basis of "such employment" in section 8(a)(3)'s first proviso is "***an*** employer." 29 U.S.C. § 158(a)(3), 1st proviso (emphasis added).

That "the Board can change its mind about the appropriate application of the Act in a given context," (SAG's Br. at 48 n.12), does not justify SAG's negotiation of its "employment in the industry" clause. The NLRB can "change its mind" about the application of the Act ***only*** if its reconsideration "is rational and consistent with the Act," *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990). Reconsideration on this issue would be both irrational and inconsistent with the Act, because in *Theatrical Stage Employees Local 644* the Board held that a clause like SAG's "***clearly*** contravenes the statutory intent of Section 8(a)(3)." 259 N.L.R.B. at 1416, 1422 (emphasis added). As *Robertson v. NLRB* suggests, the Board cannot, consistently with the Act, rewrite it such that "the precise language used by Congress would be changed so that 'an employer' would read 'employers.'" 597 F.2d 1331, 1335 (10th Cir. 1979).

SAG's final defense of its "employment in the industry" clause is that there "is nothing 'misleading' about" that clause, because it clearly states what the parties meant by it. (SAG's Br. at 49-50.) That contention is obviously fallacious. Saying that it is not misleading for an agreement to state that employees have an obligation to pay dues, when legally they have none, is Orwellian.

CONCLUSION

The judgments below should be reversed on all Questions Presented and remanded as requested in Petitioner's Brief at 30-31.[11]

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.
Petitioner's Counsel of Record

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[11] Contrary to SAG's Brief at 15, Ms. Marquez does contend that the "remand should include instructions that the district court order SAG and Lakeside to ***modify*** their current 'union security' provision so that it no longer overstates the obligations imposed, ***or*** to expunge that provision completely" if they choose not to so modify it. (Pet'r's Br. at 30-31.)